**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**(Wheeling Division)**

**CHARLES C. CUMPTAN and DEBORAH V. CUMPTAN,**

**Plaintiffs,**

**CIVIL ACTION NO.: 5:10-CV-00012**

**VS.**

**ALLSTATE INSURANCE COMPANY, and LARRY D. POYNTER, individually, and ED STEEN, individually,**

**Defendants.**

**DEFENDANTS LARRY D. POYNTER AND ED STEEN'S REPLY IN FURTHER SUPPORT OF THEIR AMENDED MOTION TO DISMISS**

COME NOW the Defendants, Larry D. Poynter and Ed Steen, hereinafter referred to as "Adjuster Defendants," by and through their counsel, Walter M. Jones, III, Michael M. Stevens and Martin & Seibert, LC. and respectfully submit the following reply in support of their Amended Motion to Dismiss.

1. Plaintiffs cannot avoid that their lawsuit against the Adjuster Defendants is barred by the "two dismissal rule." Their claims against the Adjuster Defendants fail as a matter of law under that rule, which in itself justifies dismissal here.

2. Contrary to plaintiffs' contention, the Adjuster Defendants cannot, as a matter of law, be liable for any allegations arising from or related to breach of the duty of good faith and fair dealing in that they had no contractual relationship with plaintiffs.

3. To the extent plaintiffs are asserting a "conspiracy" claim against the Adjuster Defendants, that claim fails as a matter of law.

4. With regard to plaintiffs' claims being time-barred, the Adjuster Defendants included the statute of limitations argument because this Court granted leave to resubmit their dismissal motion and brief with a complete copy of the 1990 state court complaint. (See: September 23, 2010 Memorandum Opinion and Order, Docket No. 24, at 6.) The Adjuster Defendants understand that this Court's decision on the statute of limitations issue in the *Marple* and *Ash* cases, also filed by plaintiffs' counsel, may apply here.[1] Nonetheless, in addition to complying with this Court's September 23, 2010 Order, the Adjuster Defendants included the argument in their opening brief in order to preserve it for appeal.

In all events, though, plaintiffs' claims against the Adjuster Defendants fail as a matter of law based on the two dismissal rule, so the Adjuster Defendants respectfully move this Court to dismiss plaintiffs' claims against them in their entirety.

## ARGUMENT

### I. PLAINTIFFS' LAWSUIT AGAINST THE ADJUSTER DEFENDANTS IS BARRED BY THE "TWO DISMISSAL RULE."

As discussed in detail in the Adjuster Defendants' opening brief (at pp. 12-18), plaintiffs' lawsuit against the Adjuster Defendants is barred by the "two dismissal rule," which allows a plaintiff to re-file the same claim following a voluntary dismissal only once before attaching prejudice to the action. *See, e.g., Manning v. South Carolina Dep't of Highway & Pub. Transp.,* 914 F.2d 44, 47 (4th Cir. 1990); *Wahler v. Countrywide Home Loans, Inc.*, 2006 WL 2882495 (W.D.N.C. Oct. 5, 2006) (same

[1] *Ash v. Allstate Ins. Co., et. al*., United States District Court for the Northern District of West Virginia, Civil Action No. 5:10-CV-5; *Marple v. Allstate Ins. Co., et. al.,* United States District Court for the Northern District of West Virginia, Civil Action No. 5:10-CV-3.

principle);[2] *Gabhart v. Craven Regional Med. Ctr.,* 73 F.3d 357, 1995 WL 764240 (4th Cir. 1995) (unpublished decision) (same principle).

Applying the above case law here, the instant lawsuit is clearly barred by the two dismissal rule. As discussed fully in the Adjuster Defendants' opening brief, plaintiffs filed a lawsuit against Allstate in May 1990, arising from the same automobile accident at issue in the instant case, based on Allstate's alleged failure to pay them the full amount of UIM benefits allegedly owed them, and they voluntarily dismissed Allstate from that lawsuit on September 5, 1990. On December 2, 2009, plaintiffs filed a second lawsuit against Allstate, this time also naming the Adjuster Defendants, substantively identical to the instant lawsuit, which they voluntarily dismissed on December 15, 2009. While certain of the causes of action may be different, it is clear that all three lawsuits here arise from the same facts -- *i.e.,* the automobile accident in which plaintiffs were injured and their claim that coverage exists under the relevant Allstate policy -- and assert fundamentally the same claims -- *i.e.,* plaintiffs' alleged entitlement to additional underinsured motorist coverage benefits. This is precisely the scenario presented in the above cases in which the courts dismissed a third lawsuit based on the "two dismissal" rule.

Moreover, with regard to plaintiffs' argument that they did not seek stacking in the 1990 suit, the fact is the two dismissal rule applies even when the theories or claims asserted in the suits are not identical. For example, in *Manning,* a dispute involving the alleged wrongful condemnation of the plaintiff's land, the plaintiff filed a suit in 1982 naming as defendants the Highway Department and other individuals involved in the condemnation proceeding. The plaintiff voluntarily dismissed the suit on January 28, 1982. On June 5, 1985, he filed a state action naming Evans and other defendants alleging, inter alia, claims for violation of constitutional rights, conspiracy and fraudulent misrepresentation. On July 9, 1985, plaintiff voluntarily dismissed the individual defendants from that suit. On June 11, 1985, the plaintiff re-filed the case before the *Manning* court, naming as defendants the State of South Carolina, the Highway Department and various individuals, including Evans. This action asserted claims for constitutional and RICO violations, abuse of process, fraud and deceit. 914 F.2d at 46-47. The court held the two dismissal rule applied even though the causes of action were not identical to those previously asserted.

---

[2] Copies of unpublished decisions cited herein were previously attached as Exhibit "B" to the Adjuster Defendants' Memorandum of Law in Support of Motion to Dismiss as filed on January 29, 2010 (Docket No. 7) with said exhibit incorporated herein by reference.

Similarly, in *Gabhart*, the Court noted that the case before it was the third action filed by Gabhart alleging he was wrongfully discharged. The previous two actions were filed in North Carolina state court and voluntarily dismissed. Noting that North Carolina had a two dismissal rule substantively identical to Fed. R. Civ. P. 41(a), the Court found the rule barred Gabhart's third action. In so ruling, the Court rejected Gabhart's argument that he was "proceeding on different legal theories" in his first two actions, and held that Gabhart's prior state court actions, while alleging different causes of action, involved the same underlying facts and were "fundamentally the same." 1995 WL 764240 , **1-2.

As *Manning* and *Gabhart* show, the "two dismissal" rule applies even if the suits involve different causes of action and/or legal theories, so long as the underlying facts are fundamentally the same. Here, this standard squarely brings the two dismissal rule into play, since *all* the lawsuits brought by plaintiffs arise under same underlying facts -- *i.e.,* their injury in the relevant automobile accident and their seeking of underinsured motorist coverage benefits. Here, as in *Manning* and *Gabhart,* the two dismissal rule plainly applies.

Plaintiffs cite *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery,* 534 F.2d 1012 (2d Cir. 1976), for the proposition that the "two dismissal" rule does not apply when one of the dismissals results from a settlement and agreement by the parties. (Pl. Brf. at 6.) Plaintiffs are wrong. *Poloron* held only that the two dismissal rule did not apply in that case because the first dismissal was without prejudice, so that it could be inferred that the plaintiffs had not affirmatively indicated they would not pursue their claims against the defendants. 534 F.2d at 1017-18. Here, by contrast, as Exhibit C to the Adjuster Defendants' opening brief plainly shows, the first dismissal was *with* prejudice.[3] Accordingly, *Poloron* has no bearing here, and courts have so held. *See, e.g., Schott v. Hepler,* 101 F.R.D. 99, 101 (N.D. Ind. 1984) (finding *Poloron* inapposite where "first dismissal, which admittedly was upon stipulation, was with prejudice").

Plaintiffs argue the fact that the previously missing page 5 of the 1990 complaint discusses only one $100,000 policy limit shows the issue of stacking was not raised in that suit, and therefore that the "two dismissal" rule does not apply. (Pl. Brf. at 6.) However, the reference to the $100,000 policy limit makes no difference, because, as discussed above, there is no question that the 1990 lawsuit, like the subsequent lawsuits, arose from the same facts -- *i.e.,* the automobile accident in which plaintiffs were involved -- and asserted the same sort of claims regarding plaintiffs' alleged entitlement to additional UIM benefits.

---

[3] Exhibit "C" of Adjuster Defendants' Memorandum of Law in Support of Motion to Dismiss as filed on January 29, 2010, Docket No.7, as amended on October 13, 2010, Docket No. 27-2, is incorporated herein by reference.

Contrary to plaintiffs' contention (at p. 7), the fact that only Allstate, but not the Adjuster Defendants, was named in the original suit also makes no difference. As with the individual defendant in *Manning*, who was not named in the original lawsuit in that case, the legal rights of the Adjuster Defendants, which turn on plaintiffs' alleged entitlement to additional UIM benefits, were clearly implicated in the original lawsuit. Moreover, like the North Carolina two dismissal rule at issue in *Gabhart,* West Virginia's two dismissal rule does *not* include any requirement that both actions be against the same defendant. Rather, the Rule plainly states that "a notice of dismissal operates as adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action *based on or including the same claim*." *See* W. Va. R. C. P. 41(a) (emphasis added). Because the two dismissals plaintiffs filed were unquestionably "based on or including the same claim," the "two dismissal" rule conclusively bars plaintiffs' current lawsuit against the Adjuster Defendants regardless whether they were named in the 1990 lawsuit.

## II. PLAINTIFFS' CLAIMS FOR COMMON LAW BAD FAITH ARE NOT PROPERLY ASSERTED, AND THEY ARE NOT SAVED BY ANY PURPORTED "CONSPIRACY" THEORY.

As set forth in the Adjuster Defendants' opening brief (at pp. 10-11), dismissal is further warranted here because the Adjuster Defendants are plainly not, and are not alleged to be, parties to the insurance contract between plaintiffs and Allstate, hence no common law bad faith cause of action exists against them under West Virginia law. *See, e.g., Grubbs v. Westfield Ins. Co.*, 430 F. Supp. 2d 563, 567 (N.D. W. Va. 2006) (noting that "there is 'simply nothing to support a common law duty of good faith and fair dealing' on the part of insurance agents or adjusters towards insureds," and finding that insurance adjuster was employee of insurer and not a party to the plaintiff's insurance contract; hence no common law bad faith claim could exist as to him). *See also Elmore v. State Farm Mut. Auto. Ins. Co.,* 202 W. Va. 430, 434, 504 S.E.2d 893, 896 (1998) ("the common law duty of good faith and fair dealing in insurance cases under our law runs between insurers and insureds and is *based on the existence of a contractual relationship*") (emphasis added).

This issue was expressly addressed by this Court in its remand Orders in *Ash* and *Marple,* wherein this Court confirmed, under similar facts, that there could be no cause of action against the Adjuster Defendants for common-law "bad faith." (*Ash* remand Order, at 6-7; *Marple* remand Order at 7-8.)[4] In so doing, this Court acknowledged the applicability of *Grubb*s, *supra*, in concluding such a claim could not be maintained due to the lack of a contractual relationship between plaintiffs and the Adjuster Defendants.

Plaintiffs try to avoid this pleading defect by arguing, based on *Dunn v. Rockwell,* 225 W. Va. 43, 689 S.E.2d 255 (2009)*,* that the Adjuster Defendants "may be held liable for a tort, *i.e.,* common law bad faith, where they conspired with Allstate for the commission of common law bad faith." (Pl. Br. at 18.) This argument is a non-starter because, as discussed fully below, plaintiffs have no viable "conspiracy" claim against the Adjuster Defendants as a matter of law. Plaintiffs' reliance on *Dunn* to support their conspiracy theory is misplaced. The alleged conspiracy in *Dunn* was between a husband and wife, *not* a corporation and its employees. So, unlike in this case, the no intra-corporate conspiracy doctrine, discussed below, did not apply in *Dunn.*

---

[4] (Civil Action No. 5:10-CV-3 at Docket No. 25; (Marple); Civil Action No. 5:10-CV-5 at Docket No. 25. (Ash)).

Moreover, even if the no intra-corporate conspiracy doctrine did not bar plaintiffs' purported conspiracy theory (which it does), plaintiffs' contention that they have adequately alleged a claim for civil conspiracy against the Adjuster Defendants is clearly wrong. To establish civil conspiracy, while the plaintiff does not need to "produce direct evidence of a meeting of the minds, [he] must come forward with specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective," which means there must be some showing, beyond "mere speculation and conjecture," that all the defendants had some sort of "mutual agreement." *Wenmoth v. Duncan*, 2009 WL 2707579 (N.D. W. Va. Aug. 26, 2009) (dismissing civil conspiracy claim where plaintiff failed to establish these elements). Here, even a cursory reading of plaintiffs' Complaint shows they have alleged none of these things. There is no allegation of any sort of mutual agreement, or, as stated in *Dunn,* any sort of "combination of two or more persons by concerted action." *Dunn,* Syl. Pt. 8.

## III. PLAINTIFFS' COMPLAINT IS DEVOID OF ANY ALLEGATIONS OF SPECIFIC CONTACT BETWEEN PLAINTIFFS AND THE ADJUSTER DEFENDANTS, AND PLAINTIFFS ALSO CANNOT AVOID THIS PLEADING DEFECT VIA THEIR FLAWED "CONSPIRACY" THEORY.

Plaintiffs do not dispute that their Complaint is devoid of any allegations of specific contact between plaintiffs and the Adjuster Defendants. As discussed in the Adjuster Defendants' opening brief (at pp. 11-12), this in itself is fatal to plaintiffs' claims against the Adjuster Defendants. *See, e.g., Grennell v. Western Southern Life Ins. Co*., 298 F. Supp. 2d 390, 400-01 (S.D. W. Va. 2004) (finding non-diverse individual defendants were fraudulently joined because it was apparent that none of the plaintiffs had any contact with these defendants, and, even in the absence of such evidence, the plaintiffs' allegations regarding any such contact failed to satisfy the particularity requirements of West Virginia Rule of Civil Procedure 9(b), and further stating the "complaint does not allege any specific contact between Ms. Grennell and the named defendants"); *Burns v. Western Southern Life Ins. Co*., 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004) (another case alleging that the defendant insurer and certain of its agents fraudulently sold life insurance policies where court found the "individual Defendants, all West Virginia residents, were fraudulently joined," because it was undisputed the plaintiffs "had no contact with any of the individual, diversity-destroying Defendants," and, "in the alternative, [the] Plaintiffs failed to allege fraud with particularity against the individual Defendants").

Instead of attempting to distinguish these cases in any meaningful way, plaintiffs argue they have adequately alleged fraud and deceit claims against the Adjuster Defendants because they have "specifically alleged conduct by each of the defendants." (Pl. Br. at 19.) But merely "alleging conduct" by a defendant, such as that their name was in the claim file, simply does not equate to alleging the requisite *specific contact* between plaintiffs and the Adjuster Defendants.

Apparently aware of this pleading deficiency, plaintiffs again rely on their baseless "conspiracy" theory as a ground for distinguishing *Grennell.* As discussed above, however, plaintiffs' Complaint says nothing about "conspiracy," and, even if it did, the no intra-corporate conspiracy doctrine, discussed below, means that plaintiffs have no possibility of stating any such claim against the Adjuster Defendants.

## IV. PLAINTIFFS' CONSPIRACY CLAIM FAILS AS A MATTER OF LAW.

Plaintiffs maintain that what they are really complaining about is a "conspiracy" between Allstate and the Adjuster Defendants. (Pl. Brf. at 12.) Plaintiffs' contention that "conspiracy" is even an issue in this case is puzzling, because, as noted, the Complaint is devoid of any conspiracy allegations. There is no count for conspiracy and the word is not even mentioned in the Complaint. Nor can plaintiffs be heard to argue that supposed allegations of "joint action" between the Adjuster Defendants and Allstate amount to allegations of "conspiracy," since the Complaint lacks any such allegations. *See, e.g., Hastings v. Sevison*, 2009 WL 790010, *5 (D. Utah Mar. 24, 2009) (dismissing plaintiff's conspiracy claim based on insufficient complaint allegations, and noting: "Indeed, Plaintiffs' complaint does not even mention a conspiracy"); *Serrano Medina v. U.S.,* 709 F.2d 104, 106-07 (1st Cir. 1983) (same principle, stating: "The complaint does not mention a conspiracy or state facts from which the existence of a conspiracy might be inferred").

Indeed, this issue was expressly addressed by this Court in its remand Orders in *Ash* and *Marple, supra.* In both these cases, which reflected substantively identical complaint language, this Court found these complaints devoid of viable conspiracy allegations. (*Ash* remand Order at 5-6; *Marple* remand Order at 6-7.)[5]

Even more fundamentally, as a matter of law, plaintiffs cannot state a claim for "conspiracy" against the Adjuster Defendants. It is well settled that a civil conspiracy requires concerted action by two or more persons or entities, *see, e.g., Dixon v.*

---

[5] (Civil Action No. 5:10-CV-3 at Docket No. 25; (Marple); Civil Action No. 5:10-CV-5 at Docket No. 25. (Ash)).

*American Industrial Leasing Co.,* 162 W. Va. 832, 834, 253 S.E.2d 150, 152 (1979), and equally well settled that, under the no intra-corporate conspiracy doctrine, a corporation cannot conspire with its employees, *see, e.g., Ridgeway Coal Co., Inc. v. FMC Corp.*, 616 F. Supp. 404, 408 (S.D. W. Va. 1985).

For example, in *Ridgeway*, the court dismissed a civil conspiracy claim where, as here, the plaintiffs alleged that the defendant corporation and two of its employees conspired with one another. The court stated, in language equally applicable here:

> It is a well-settled principle of law that civil conspiracy requires concerted action by two or more persons or entities. Because of the requirement of more than one entity for actionable civil conspiracy, several courts have ruled that a corporation cannot conspire with its employees. A corporation can only act through its employees. To hold that a corporation can conspire with its employees would be to effectively hold that a corporation could conspire with itself. Any acts undertaken by Curry with respect to the Orgas property would have been in the course of his employment with FMC. His acts are the acts of FMC. Being but an agent of the corporation, he cannot be said to have conspired with it.

616 F. Supp. at 408-09 (citing *Dixon, supra*). The *Ridgeway* court held that, because of the no intra-corporate conspiracy doctrine, the plaintiffs "could prove no set of facts which would entitle them to relief under the legal theories advanced," including their conspiracy theory. *Id.* at 410. *See also U.S. v. Gwinn*, 2008 WL 867927, *20, *25 (S.D. W. Va. Mar. 31, 2008) (citing *Grose v. Mansfield Corr. Inst.,* 2007 WL 2781654 (N.D. Ohio Sept. 24, 2007) for the principle that "under the intracorporate conspiracy doctrine, two employees or agents of the same corporation cannot form a conspiracy with one another because they are not considered 'two or more separate persons'"; further noting "it is clear that the Fourth Circuit accords a significant amount of weight to

the basic principle that it is a legal impossibility for a corporation to conspire with its agents, and likewise, for its agents to conspire with one another").

Here, too, even if plaintiffs had attempted to allege any facts showing "conspiracy" (they did not), any such claim would be precluded by the no intra-corporate conspiracy doctrine. As in the above cases, Allstate, as a corporation, cannot conspire with its employees, and the Adjuster Defendants, as agents of the corporation, cannot be said to have conspired with Allstate.

Nor can plaintiffs be heard to argue that the exceptions to the no intra-corporate conspiracy doctrine apply here: *i.e.,* (a) the "independent personal stake" exception, when the agent has a personal stake in the alleged illegal activity independent of his relationship with the corporation; or (b) the "unauthorized act" exception, when the agent is alleged to have acted outside the scope of his authority or employment. *U.S. v. Gwinn*, 2008 WL 867927 (S.D. W. Va. Mar. 31, 2008). The "independent personal stake" exception does not apply, because plaintiffs do not allege, nor can they, that either of the Adjuster Defendants had a personal stake, independent of their relationship with Allstate, in the alleged wrongful conduct of failure to pay plaintiffs additional UIM coverage. The "unauthorized act" exception also does not apply, because plaintiffs specifically allege the Adjuster Defendants were acting within the scope of their employment when they engaged in the alleged wrongful conduct (Compl., ¶¶ 4-5), and they certainly do not allege the Adjuster Defendants were acting outside the scope of their authority or employment. This is the very situation that existed in *Gwinn,* where the court rejected application of the two exceptions. *See, e.g., Gwinn,* 2008 WL 867927, *25 (noting the "unauthorized act" exception was "not applicable because the

Government did not allege in its Complaint that Defendants acted outside the scope of their employment," and that the "independent personal stake" exception did not apply, because: "Where a corporation's success is directly dependent on the agent's success in furthering the illegal activity, the two are directly related and are not 'wholly independent' of one another. If one benefits, so will the other").

## **CONCLUSION**

For all the foregoing reasons, as well as those set forth in their opening brief, defendants Larry D. Poynter and Ed Steen respectfully submit that plaintiffs' Complaint against them should be dismissed with prejudice and without leave to amend, in its entirety, based on the "two dismissal" rule. At the very least, any allegations implicating or arising from a purported breach of the duty of good faith and fair dealing, and any allegations premised on a purported conspiracy between the Adjuster Defendants and Allstate, should be dismissed with prejudice and without leave to amend.

**LARRY D. POYNTER AND ED STEEN**
By Counsel

MARTIN & SEIBERT, L.C.
BY: ***/s/ Michael M. Stevens***
Walter Jones III (WV Bar #1928)
Michael M. Stevens (WV Bar #9258)
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25402-1286
Phone: 304-267-8985
Fax: 304-267-0731
mmstevens@martinandseibert.com

## CERTIFICATE OF SERVICE

I, Michael M. Stevens, hereby certify that on the **3rd** day of **November**, **2010**, I electronically filed ***Defendants Larry Poynter and Ed Steen's Reply in Further Support of Their Amended Motion to Dismiss*** with the Clerk of the Court using the CM/ECF system which will send notification of such filing, to the following:

Christopher J. Regan
Michelle L. Marinacci
BORDAS & BORDAS PLLC
1358 National Road
Wheeling, WV 26003

MARTIN & SEIBERT, L.C.

BY: ***/s/ Michael M. Stevens***
Walter Jones III (WV Bar #1928)
Michael M. Stevens (WV Bar #9258)
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25402-1286
Phone: 304-267-8985
Fax: 304-267-0731
mmstevens@martinandseibert.com